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Keynote Address

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Keynote Address at the Annual Nova Law Review Banquet
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Honorable Gerald Kogan^{*}

It is always very nice to appear here with the Nova Law Students. For those of you who do not realize it, at one time, while I was living in this area, I taught at Nova on the adjunct faculty. I taught trial advocacy and I also taught professional responsibility, and I always loved the students here because you are so active and so alive and it is a great pleasure for someone to teach in that type of environment.

I am proud to say I think that certainly, in recent years, we have come down with some very important, and in some respects, monumental decisions from our Court. Our Court has really been on the cutting edge of a lot of things. I am also proud to say that many of the reforms we have instituted in regard to the regulation of the practice of law; with regard to our relationships with the attorneys that are practicing, have really been a model for the rest of the nation. Some of our programs have been adopted all over the country. You ought to be proud that your Court has been able to do these things and I am very proud that I am part and parcel of that entire operation. Hopefully, over the next years, during my term as Chief Justice, we can increase our visibility around the nation and do things for the people of the State of Florida, as well as the legal profession, that have never been done before.

We are very excited about our "Home Page" on the Internet and you might be interested in this: a "kid's court" which you might be able to dial into this summer. And we are thinking about having the "talking gavel" where school children will be able to dial in, ask questions about the legal system, and we will be able to answer these questions for them. This is our attempt to make the Court more accessible to people and also to allow school children, from the youngest age, to understand what the legal system is, and what it can, and at the same time, cannot do for them. We are looking

^{*} Chief Justice, Supreme Court of Florida, 1996 to present; Justice, Supreme Court of Florida, 1987–1996. B.A., University of Miami, 1955; J.D., University of Miami, 1955.

forward to this and we are excited about it. Personally, the computer, in my opinion, will never replace the law book because I get neck strain and eye strain trying to read opinions off of the computer screen. I still like to sit back in my chair, cross my legs, and put that Southern Reporter in my lap, and read it that way. It's much more entertaining and besides, it's hard sometimes to "teach an old dog new tricks." And speaking of teaching an old dog new tricks . . . when I first started practicing law, it was a whole different world. Nowadays you are fortunate, especially at Nova, where you have a super clinical program, one of the finest around. I had the pleasure of meeting your Dean about two weeks after he became Dean. I headed a committee to study the Board of Bar Examiners. We brought Dean Harbaugh in to talk to us about an exciting new principle in taking the bar exam called "performance testing." And one day you may all see that in Florida. As soon as we bring some of these people into the twenty-first century, who have the say about these things, we may be able to put that on-line. It is an exciting concept, and I am really looking forward to hopefully one day adopting it.

Now, I want to discuss with you a few matters and then I am going to give you the opportunity which you may never have again in your lifetime, and that is the opportunity to ask questions of a Justice on the Florida Supreme Court. The only things you cannot ask me about are pending cases or something which may come before the Court. Do not worry, you will not embarrass me. I have been around long enough now where absolutely no question is embarrassing.

What I do want to discuss with you are a couple of subjects that I do think are very important, especially for those of you who are going into the practice of law. I am going to make some statements to you which some of you may acknowledge and some of you may not want to accept. But I'll tell you at the onset as I lead into what I want to talk to you about: most of you will never ever get rich practicing law. So if any of you think you will one day be able to sit back, and rake in the money, and watch it pile up high, very few of you will be in that position. The practice of law is not for the purpose of making yourself wealthy. It is for the purpose of assisting people within our society and our community to find their way through our legal system. It is the job of the attorney to assist our citizens in working their way through that complicated and mysterious world of the legal system. It is a profession in the truest sense. What has happened recently, and this distresses me a great deal, is that we have, by our fee-setting practices, managed to price out of the legal system (except in the case of contingent fees), that great middle income group that makes up the majority of people

who live in this country. If you are indigent, truly indigent, you've got Legal Aid. If you are a defendant in a criminal case, you've got the Public Defender. If you're wealthy, you don't have a problem, you can afford to pay attorney's fees. But the great mass of Americans are out there unable, or find it extremely difficult, to buy their way into the legal system. Now I told you before, "don't expect to get rich." And I know there are a number of you out here worried, "Will I get a job?" "Can I pay these loans?" "How am I going to be able to manage this?" Well, I want to tell you something: there is a lot of work out there if you are willing to look for it. But you have to say to yourself: "Okay I am not going to live in a million dollar mansion or drive a Rolls Royce or Mercedes, and I am not going to Europe for vacation every summer. Instead, I'll live in a much more affordable home, I'll drive a Chevrolet, and I'll go to the Great Smokies or the Grand Canyon instead of going overseas each year." And the reason you will do that is that you will create and establish the service which the legal profession was designed to do. That is: provide access and effective access to the legal system. You are going to make your fees more affordable so that we can bring back into the fold those many many people who make up our middle income group in this country and give them better access to our legal system. And, along with that, you are going to give only twenty hours per year of pro bono work. And, by the way, pro bono does not mean that "I sent the client a bill and he never paid it." Pro bono means: "I started out knowing that I was not going to charge for the service and I knew I was not going to get paid when I started it because the client could not afford my regular fee." Twenty hours per year—that's only two and one-half days per year in a forty hour week and most of you going into the legal profession will work a lot more than forty hours in one week. But this is an absolute necessity in our society because we cannot have a legal system for the wealthy; a legal system for the elite. We need a legal system that is going to meet the needs of all of our people. So you have got to get out there and you have got to give back to the system for the privilege of practicing law. Which brings us to: "How am I going to practice law?"

I'll tell you how you're going to practice law. You are going to say to yourselves: "I am going to practice in a professional manner, and I am not going to be a 'Rambo-type litigator.'" A Rambo-type litigator is someone who sends you a Notice of Hearing the next morning on your fax machine after you've closed the office at five o'clock that night. Then the next morning shows up in court and says, "Judge, I faxed them a notice of the hearing and I do not know why they are not here." Or somebody who files interrogatories by the pound and drives the other side crazy. Let me tell you

something: you can be a good, tough litigator; you can represent your client in the best traditions of the profession and win cases for your client without destroying the integrity of this profession.

This may sound strange to you but many years ago when I was a young lawyer—and despite the color of my hair, I was a young lawyer—and I was a young prosecutor many years ago, I remember convicting people who were sentenced to life in prison who would shake my hand and say, “Mr. Kogan, I want to thank you for giving me a fair trial.” So you can win your cases, you can win the tough ones, but you have to do it with dignity and with honor. I am not telling you anything new. All of you know that the legal profession is not admired. I think the only people who we actually rank ahead of in the mind of the public are the politicians. That is a horrible way for us to even look at something. We are a noble and an honorable profession. We can only remain a noble and honorable profession if we give up that feeling of greed—that desire to make piles and piles of money and we don’t care how we make it or what we have to do to make it. If you can reconcile in your own mind that you are able to put that aside and do what you know you have to do and be a professional, we’re all going to be a lot better off, including the people that we serve.

I want you to understand one thing and this is very, very important. There will be times where you will be sitting in your office, especially as a young lawyer, and you will say, “the mortgage payment is due, the student loan payment is due, I have got to make the car payment, and I do not know where the money will come from.” And there will be temptations to find that money in a way which is not consistent with the honesty, dignity, and integrity of the legal profession. I want to tell you right here and now, that there is no case and there is no client that is worth your sacrificing your honesty and your integrity and dignity as a lawyer, because the entire system rests upon the honesty and the integrity of the persons who make up that system, and lawyers are an integral part. So say to yourself, “If I am going to be a lawyer, I am going to be what I am supposed to be and that is someone of the highest reputation and someone who, whatever you do, you can be proud of.” I remember my old boss, State Attorney, Richard Gerstein. Some of you may have heard of him, some of you may have known him, and he always said to us when he spoke about honesty and integrity, “Never do anything in the practice of law that you would not want to read about the next morning in the *Miami Herald*.” I think there is a lot to that and I think that tells you what is right and what is wrong. The Florida Bar has an ethics hotline you can call if you have close questions, but I think all of you should have a sense of what is right and a sense of what is wrong, and whenever you

are faced with those problems to ask yourself: "Is it right, or is it wrong?" You need to do right. That's my little lecture for this evening and now I want to open it up for questions.

Question: How do you react to the quality of advocacy of the lawyers who appear before you and what, if anything, would you like to see law schools do a better job in training?

Answer: First of all, learn to read, learn how to write, and learn how to speak. Some of the briefs filed with the highest court in the state: the sentence structure is abominable, punctuation is terrible. It is just unbelievable! These are not just new graduates of law schools but these are people who have practiced for a long time in the profession. Also, all communication is just as important as the written word because many of you will not be writing briefs or legal memos but will be dealing with clients, appearing in court, so you have to learn to communicate. The one thing I think you have got to do is make sure that the students, upon graduation, can communicate both in writing and orally. The quality of argument in front of us ranges from "outstanding" to "abominable." Quite frankly, at times I really feel embarrassed for the attorneys who appear in front of us with the arguments they present. If they would make a concentrated effort to learn how to communicate we would be a lot better off.

Question: About a week ago, a tort reform measure in California failed and the evening news reported that big business was defeated by consumerism or consumer advocates. On the other hand, it is even more commonplace to see disgruntled consumers of legal service as the primary motive behind tort reform. From your perspective, do you see this legal reform / tort reform primarily motivated by corporate America, or consumers who have been "ripped off" by unethical attorneys?

Answer: Let me say this to you. I think if I were a big corporation, I would not want to be sued for a defective product that I might put out. I do not want big verdicts against me. I do not want to see especially punitive damages which really entirely outweigh what the actual compensatory damages are. So, I don't want to put the blame on anything. But my philosophy has always been this: these cases essentially go to juries who are citizens selected by both sides during the lawsuit and the trial. This is the way that our system works. If that jury finds for a particular side, so be it. I have my own personal opinion but, as a Justice on the Supreme Court, I don't want to give it to you so I am skirting around the edge. But I think that the fact that these are not juries that are picked out of the sky by plaintiff's attorney; these are juries picked by both the Plaintiff and the Defense, and

they are the ones who render the final decision in a particular case and that is something you have to consider.

Question: There is also an amendment to limit the percentage of the claim which the lawyer can collect on. What is the Court's view on this?

Answer: We have already come out with an opinion which limits, on a contingent fee basis, the amount of fees which an attorney can make in the State of Florida. There are arguments both ways. One of the arguments is that the client would not have gotten anything if it were not for the attorney's efforts. So, really, why does the client complain when the attorney gets "x" percentage of that recovery? That is one of the arguments. The other argument is that really it is the client that is entitled to it and not the attorney. So there are arguments on both sides of that.

Question: You were a practicing lawyer and judge, which one do you prefer?

Answer: Really want to know? Practicing lawyer. That is the greatest part of this profession: the ability to go into court and represent somebody. I was a trial lawyer for twenty-five years. The glory that goes with it: the arguing to the Judge, the questioning of witnesses, the cross examination, the arguing of the case to the jury. And then the true moment in every trial lawyer's life is when the knock is on the door and the Bailiff says, "Do you have a verdict?" and the answer is "Yes" and the Bailiff looks at you and says, "I am going to get the Judge, the jury has a verdict." From that moment on, as your heart sinks gradually into your stomach, you wait. There is no greater feeling of exaltation than when the clerk reads the verdict form and they get to the end and you have won that case. That to me is the greatest feeling in the world. I miss trying cases, but I'll be honest with you, what really happened to me was that after twenty-five years of battling these things, I had just reached a point. Call it burnout or whatever. It was just time to do something different. But I love the courtroom so much that when the opportunity came along to be a trial judge, I jumped at that opportunity. That was fun also. Quite frankly, I miss sitting on the trial court, the dynamics that go on in the trial court. Those of you who have been in there know what I am talking about. There is something about the attorneys, the litigants, the witnesses, the juries, and the excitement of the courtroom drama that really is what I go for. That's my kind of thing.

Where I sit right now is very sterile and very antiseptic. You just have the attorneys arguing the cases. The good part about it is how I used to read the cases in the Southern Reporter and think, "How can these confounded idiots come down with a decision like that?" Of course now I am one of the "confounded idiots." But it is nice to be able to say what the law is. You

would be amazed at the tremendous power you have when you sit on the Supreme Court of a State because unless there is a U.S. Constitutional issue involved, that is the last stop. For most litigants in the state system, that's it. I remember when I was sitting there in the very beginning in 1987 and an issue came up and everybody was discussing, "Well that really is outdated and I really do not know why we follow that principle anymore," and someone else popped up and said, "Why are we talking about this, we're the Supreme Court let's change the law." And we did! You can't do that in the trial court and you can't do that as an attorney who is practicing. Also, you realize the tremendous and awesome responsibility.

When you sit as a trial court judge, your decision in one particular case really only affects the persons involved in that one case. It does not even have an affect on your fellow or sister judges down the hall, or has no lasting jurisprudence. But I am telling you, when we make that decision, we are conscious that it affects nearly fourteen million people who live in this State not to mention the forty million plus visitors who come to this State each year. So the awesome responsibility is there. Also, we are the chief administrative agency of the entire court system and every one of the Justices sits on committees and commissions and chairs them; and a lot of our work is administrative. It is the hardest job I have ever had in my life. You're talking to someone who used to be a homicide prosecutor and who used to defend people charged with capital crimes. Someone who used to really sweat out those juries. Yet of all the work I've done, this is the hardest one of all. It is a seven day a week job. You stay at it and go from one place to another. It's good in that you really see the whole system. And it is even better because it's enjoyable. Like tonight, I love coming here and speaking to prospective lawyers and lawyers and faculty. It's great, that is one of the advantages of the job.

Question: You mention that both sides pick the jury. I had an experience when I was called to jury duty in Broward County. I don't know if this was a fluke or not but there were about 500 of us the first day. They gave the jury pool a talk and said all of you who want to be excused, line up. All of a sudden I saw every person who looked like they had a responsible job line up to be excused. I stood up, the clerk never asked what the reason was. This occurred about 1990.

Answer: I am familiar with the jury pool system in Dade County and I know that the only person who can excuse a prospective juror is the judge assigned to the jury pool. We actually had a bench in the jury pool room and we would have them come forward one by one and find out what their excuses were. That is the proper way to do it.

Question: The only people left were retired, unemployed, or had labor jobs who would rather be in an air conditioned courtroom.

Answer: That does not mean they were not competent. There are lots of persons that are retired, unemployed, or laborers, who make good jurors. But you are correct, there should be a judge there who will listen to the excuses and make that determination.

Question: Currently there is a push to get away from the court system and get into arbitration and mediation, particularly in the securities area. The problem that I saw, and I was wondering about the Court's view, is that one does not need to be an attorney to represent someone in an arbitration.

Answer: The question is: are you practicing law and what capacity that comes in. You raise a good point and I want to tell you now that we will never have enough money appropriated by the state legislature to have the number of judges and court facilities that we need to handle everything through the court system, so mediation and arbitration are here. This certainly is the wave of the future. Most cases down the line, no matter what the field is, are going to be mediated and there is going to be arbitration. You are going to have to do it that way or else it will be impossible to handle the cases that we have. We have a crisis right now on criminal cases. In the large metropolitan areas in the State of Florida, the judges don't "hear" cases anymore they "process" the cases. Especially when—let's take Dade County—because that is a pretty jammed up court system. Every Monday, a criminal court judge comes out and there may be anywhere from thirty to seventy-five cases set for jury trial that week. Now you know that you are not going to be able to try that. As a matter of fact, you're lucky if you can even try two cases because along with the trial, there are motions, arraignments and everything else that you need to do. So what happens? Well, obviously you've got the plea bargain. Now even if you didn't have a speedy trial rule, what are you going to do with all those people? You can't put them back in and say, "We'll try this case next week" because next week you've got thirty to seventy-five more cases. So you've got to dispose of them somehow. That is why we've developed all of these pre-trial intervention programs we now have. We developed plea bargaining, domestic violence, and other intervention programs. This State is very fortunate that the Public Defenders have a sense of responsibility. You know, if the Public Defenders decided not to plea bargain anymore and take every case to trial, the legal system in this State would collapse. Even if you brought every judge from the civil side to try these cases, you will have monumental logistical problems carting prisoners back and forth trying these cases; with many judges not experienced in the criminal law; and it would be an abso-

lute mess. So you have to find alternate systems. We will have to learn to do things differently than we thought about doing them before. And if you think you can get away with the way you've been doing it, you have another thought coming.

Question: What do you think about having cameras in the courtroom and televising the trials to the general public?

Answer: Originally, when this first was approved for the State of Florida, I was absolutely opposed to it. I thought what was going to happen is that the attorneys would play to the cameras; that the judges in some instances would play to the cameras; that it would have a chilling effect on jurors who would be afraid because people would know who they are and et cetera. But I have now come 180 degrees the other way. I think that if you broadcast a trial complete from beginning to end, I think you go a long way in letting people know what our system is all about. And when they start seeing that, they begin to realize that trials like O.J. Simpson are an abomination. That is not an average run-of-the-mill criminal trial. Far from it. It does not even resemble the average, run-of-the-mill trial. But you have to run it from beginning to end. You can't give people thirty second sound bites on the six o'clock news and then have them understand why a case comes out the way it does because news media have a way of showing you that which they would like you to see. That is not to say they are doctoring the news. But I saw, sixteen years ago, a riot that resulted in eighteen people dying and tens of millions of dollars of property destroyed in Dade County because of the news media, in a trial which was moved from Dade County to Tampa. People in Dade County were fed thirty second sound bites and honestly believed that the police officers on trial in Tampa for murdering a motorist in Dade County were going to be convicted—when anybody who sat in that trial knew from the evidence that was presented that there was not going to be a conviction. And sure enough, I'll never forget the night the jury returned the acquittal. I'll remember this because I represented one of the police officers in that case. I came back to Dade County, I turned on the television and saw one of our leading educators in Dade County (who will remain nameless), get on the air and tell everybody to go down to the metro justice building in Dade County to protest this outrageous verdict. I remember that night we were having dinner in a restaurant in Miami Beach and coming over the 836 and seeing the fires in front of the metro justice building as people were trying to break in. That was the beginning of the riot. I had spoken to one of the newspaper men covering the trial who was a personal friend of mine for many years. I said to him, "You know you are not reporting what is going on here. You are building up hopes of the folks

down in Dade County that there is going to be a conviction here and you know there is not going to be one.” And his comment to me was, “I know, but that is not the way the editors want it.” What can I tell you? So I got a little far afield in answering that question but I think you have to show it from beginning to end and then people will understand what is happening.

Question: Two things you said tonight strikes a cord in freshmen students: the student loans and the competition we face when we graduate. Right now there are six ABA law schools in Florida and two more opening. What advantage is there, if any, to the public and the profession, in opening more law schools in the State of Florida?

Answer: I think you are now seeing a decrease in the amount of applications in the last ten years. The word has gotten out that there is not that great gold mine out there for jobs. What happened is that, during the 1980s, the law profession really flourished and there were a lot of jobs out there and a lot of high-paying jobs and people went out and this was “it.” My wife, Irene, worked for awhile at the Student Aid Resource Center at FSU. That is where students came in looking for scholarships. They would use the computer and research and she would get into conversations with a lot of the students and ask them their plans after graduation. They would say, “Well, I don’t really know what I want to do so I think I’ll go to law school.” And this became the popular thing and people said, “I think I’ll go to law school because no matter what I do, the law degree will probably help me.” And consequently, there are a lot of lawyers.

It’s not new to have a lot of lawyers out there. When I got out of law school, we had the same problem. We had a lot of lawyers and it was very difficult to get a job. Now I know things are relative, but when I got out of law school, in Dade County, you were lucky to get a job with a law firm at fifty dollars a week. Of course, fifty dollars in those days is more than fifty dollars today, but it was still not a lot of money. You were fortunate if you could just convince a lawyer to allow you to just sit in his or her law office and in return for that space, do work for them. I know I started out where my law office had been a supply closet. They took out some shelving and they put in a desk which was not much larger than this podium—just enough room for two other people to sit there. And the unique thing was that the bathroom was right behind my desk. Every time someone in the office had to use that facility, they had to walk through my office to get there. But I considered myself very fortunate. I did not get paid at all—not one single red cent—and I did services for the attorneys in exchange for that. The only money I ever saw in the time that I was there was when Irene and I got married. The attorney that I was working for gave us a \$100 check and that

was for about three to four month's work in the office. Now, \$100 went a long way then but, believe me, it did not go as far as you would think. And that is the situation I was looking at when I got out of law school. Today you are running into a similar situation—jobs are very very difficult to get. Although there are some statistics I have seen that by the year 2000, there is going to be a need for thirty percent more lawyers than we have now. So hang in there another four years.

Question: You mentioned about going out to offer services to the middle class, is there anything being done in the legislature to alleviate the burden of student loans?

Answer: Not that I know of. You may have the burden of student loans but as someone once said, "It's a business." You took out the loan, signed your name and said you would pay it back and that is what the banks expect you to do: pay it back. Lawyers do not invoke sympathy of the general public and not in the state legislature, and worse than that, not in Congress one bit. So don't expect to get any relief. I don't think you will see any.

Question: In light of the unacceptable legal system and shoddy lawyering you've mentioned, what do you think about putting some teeth into section 57.105 or moving toward a prevailing party attorney fee system?

Answer: The question is where do you draw the line? You can still have a good, valid legal basis for bringing a lawsuit but you might lose it. So if you start saying "you file that lawsuit at your peril," then what will happen down the road is that it will have a chilling effect on people who have legitimate lawsuits. I think that is something you want to guard against. If you say it absolutely is not a justiciable issue at all, as we do now in the Florida Statutes, that you are entitled to attorney's fees, I don't think we need to put any more teeth into it. I don't want to see people chilled out of filing what is a legitimate lawsuit. That is what you are going to do if you say, "File at your own risk. If you lose it, we'll wipe you out financially."

Question: What about the prevailing party system?

Answer: Again you've got that same problem. You have the same, "chilling effect." You have a legitimate lawsuit here. Let's assume you win at trial. You go to the District Court of Appeal and win it there and you come up to our Court and lose it by a 4-3 vote. That is just not fair. You would give up what was a legitimate lawsuit. I think it has a disastrous effect on the legal rights of people.

Thank you again for the privilege of being here. I really enjoyed it.